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IN THE

Supreme Court of the United States

October Term, 1965.

No. 301

MILTON MAZER, Administrator of the Estate of Israel Abrams, dec'd,

Respondent,

v.

HATTIE LIPSHUTZ, Executrix of the Estate of Benjamin Lipshutz, dec'd,

Petitioner,

v.

ALBERT KOHN,

Petitioner.

JOINT PETITION OF HATTIE LIPSHUTZ, EXECUTRIX, AND OF ALBERT KOHN FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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JOINT PETITION OF HATTIE LIPSHUTZ, EXECUTRIX, AND OF ALBERT KOHN FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

OPINIONS BELOW.

There was no Opinion filed by the United States District Court for the Eastern District of Pennsylvania. The Order and Judgment of the District Court (R. 277a) is appended hereto (page 1a, *infra*).

The Opinion of the Court of Appeals for the Third Circuit, rendered on April 1, 1966, is not yet reported in the Federal Reporter but is appended hereto (pages 2a to 10a, *infra*).

The Judgment of the Court of Appeals, entered on April 1, 1966, is appended hereto (page 11a, *infra*).

A Petition for Re-hearing was denied without Opinion by the Court of Appeals on May 10, 1966 and the Order denying such Petition for Re-hearing is appended hereto (page 12a, *infra*).

The Opinion of the Court of Appeals for the Third Circuit, rendered on December 30, 1963 in a prior appeal, is appended hereto (page 13a to 39a, *infra*).

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1). The judgment of the Court of Appeals sought to be reviewed was entered April 1, 1966. An Order denying a Petition for Rehearing was entered by the Court of Appeals on May 10, 1966.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW.

1. Where the law of the State, including the Uniform Contribution Among Tort Feasors Act, provides that a release of one tort feasor will reduce the obligation of other persons liable, and where in a medical malpractice case, the plaintiff releases, inter alia, the person actually committing the malpractice, did not the Federal Court err in not reducing the recovery from an individual physician who was exonerated by a jury from any personal malpractice, and who was found only vicariously liable for the act of malpractice committed by the person already released?

2. In a medical malpractice case, where plaintiff has received a substantial consideration for the release of a Hospital and its employees, and thereafter a jury finds that negligence of a specific employee of the Hospital caused the injury to plaintiff, should not the recovery from an individual physician, who was held only vicariously liable for the negligence of that Hospital employee, be reduced by the amount of money paid for the release so that plaintiff receives but one satisfaction for the same injury as required by State law.

3. Where the plaintiff has released a servant, whose negligence caused injury to the plaintiff, does not such release discharge that servant's master, who has been exonerated from any allegations of personal negligence, and whose liability is based solely upon vicarious responsibility for the negligence of his servant?

STATUTE INVOLVED IN THE CASE.

Pennsylvania substantive common law and statutory law is applicable to this litigation.

The Pennsylvania statute involved is the Uniform Contribution Among Joint Tort Feasors Act of July 19, 1951, P. L. 1130; 12 P. S. 2082. That Statute provides:

> For the purpose of this act, the term "joint tortfeasors" means two or more persons pointly or severally liable in tort for the same injury to persons or property, whether or not judgment has been recovered against all or some of them. 1951, July 19, P. L. 1130, § 1.
>
> (1) The right of contribution exists among joint tortfeasors; (2) A joint tortfeasor is not entitled to a money judgment for contribution until he has by payment discharged the common liability or has paid more than his pro rata share thereof; (3) A joint tortfeasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tortfeasor whose liability to the injured person is not extinguished by the settlement. 1951, July 19, P. L. 1130, § 2.
>
> The recovery of a judgment by the injured person against one joint tortfeasor does not discharge the other joint tortfeasors. 1951, July 19, P. L. 1130, § 3.
>
> A release by the injured person of one joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasors unless the release so provides, but reduces the claim against the other tortfeasors in the amount of the consideration paid for the release or in any amount or proportion by which the release provides that the total claim shall be reduced if greater than the consideration paid. 1951, July 19, P. L. 1130, § 4.

. . A release by the injured person of one joint tortfeasor does not relieve him from liability to make contribution to another tortfeasor, unless the release is given before the right of the other tortfeasor to secure a money judgment for contribution has accrued and provides for a reduction to the extent of the pro rata share of the released tortfeasor of the injured person's damages recoverable against all the other tortfeasors. 1951, July 19, P. L. 1130, § 5.

This act does not impair any right of indemnity under existing law. 1951, July 19, P. L. 1130, § 6.

This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it. 1951, July 19, P. L. 1130, § 7.

This act shall be known and may be cited as the "Uniform Contribution Among Tortfeasors Act." 1951, July 19, P. L. 1130, § 8.

STATEMENT OF THE CASE.

Introduction.

Petitioners submit that the Court of Appeals for the Third Circuit in reversing the District Court, contravened the well-recognized substantive law of Pennsylvania regarding the effect of releases.

All parties, as well as the Court, agree that the Pennsylvania Uniform Contribution Among Tort Feasors Act and the common law of Pennsylvania apply in this diversity case. *Erie R. Co. v. Tompkins,* 304 U. S. 64.

However, the Court of Appeals in reversing the District Court, reached a result in direct conflict with settled Pennsylvania case law and clear provisions of the Pennsylvania Uniform Contribution Among Tort Feasors Act.

Moreover, the decision of the Court below conflicts with the decisions of other United States Court of Appeals which were decided under basically the same substantive law.

Finally, the result, and the manner in which the result was reached, constitute serious departures from the usual and accepted course of judicial proceedings. For example, the Circuit Court of Appeals justifies, on the ground that the damages were "modest", the legal anomaly of requiring a master to respond fully in damages after his servant, who caused the damages, has been released by the plaintiff.

Facts.

This is a medical malpractice case.

A hospital patient died because he was transfused with the wrong type of blood.

The transfusion was given during surgery at the Albert Einstein Medical Center (Hospital) in Philadelphia, Pennsylvania. The mixup occurred because there were two patients in the Hospital with the same name.

The decedent's Estate brought two actions in the United States District Court for the Eastern District of Pennsylvania. Federal jurisdiction was based upon diversity of citizenship.

(1) One action was against the anesthesiologist at the operation, Dr. Peter Chodoff. In this action, the Hospital was joined as a third party defendant.

(2) Plaintiff's other action was against the surgeon, Dr. Benjamin Lipshutz, one of your Petitioners.[1] Lipshutz joined a Hospital employee, Albert Kohn, also one of your Petitioners, as a third party defendant.

Lipshutz also moved to join the Hospital as a third party defendant, but his Motion was denied as untimely by District Judge Joseph S. Lord, III. (The Local Rules of the Eastern District of Pennsylvania allow joinder only within six months—Local Rule 19, E. D. Pa., regarding Motions to Join Third Party Defendants.)

FIRST TRIAL AND APPEAL.

The two actions were consolidated for trial upon Motion of the *plaintiff* because "both cases arise out of the same events and involve the same issues."

The actions were tried together in January, 1962 before Judge Joseph S. Lord, III and a jury. The jury exonerated

1. Dr. Lipshutz later died and the Executrix of his Estate has replaced him on the record.

both Dr. Lipshutz and Dr. Chodoff from the allegations of negligence and malpractice. This finding stands today and is not challenged.

However, the jury did make a Special Finding that an undesignated employee of the Hospital was negligent and the jury assessed plaintiff's total damages at $89,318.

Plaintiff had previously received $60,000 from the Hospital for the execution of a Release, and Covenant Not to Sue the Hospital, its agents and employees (other than Doctors). Furthermore, there was no direct action by plaintiff against the Hospital or its employees; therefore, no money judgment was entered on the verdict.

Because of the exculpatory findings of the jury as to the Doctors, the District Court entered judgments in favor of defendants Dr. Chodoff and Dr. Lipshutz.

On appeal, the Court of Appeals for the Third Circuit granted plaintiff a limited new trial in the action against surgeon Lipshutz. The case was sent back to determine whether surgeon Lipshutz was vicariously liable (under respondeat superior) for the negligence of Albert Kohn, the chief blood bank technician employed by the Hospital. See *Mazer v. Lipshutz,* 327 F. 2d 42, 58 (3rd Cir. 1963-64) (appended hereto, pages 13a to 39a, *infra*).

Second Trial.

The limited issues were re-tried before Judge Joseph S. Lord, III and a jury.

At the second trial, the jury found that Albert Kohn was negligent. The jury also found that Kohn's negligence took place in or near the operating room. Accordingly, under the "Captain of the Ship" Doctrine of Pennsylvania, surgeon Lipshutz was held liable for the negligence of Kohn. That doctrine is applicable to surgeons and hold them vicariously liable, under respondeat superior, for negligence which occurs in or near a surgical operating room. See, for example, *Yorston v. Pennell,* 397 Pa. 28 (1959).

Third party defendant Kohn was held liable over to Dr. Lipshutz for indemnity because it was established that

it was Kohn's negligence (not Lipshutz's) which caused the wrong blood to be administered.

District Judge Lord entered an Order on April 30, 1965 (page 1a, *infra*) giving Lipshutz $60,000 credit off plaintiff's total damages of $89,318 because $60,000 had already been paid to plaintiff for the Release, and Covenant Not to Sue the Hospital, its agents and employees (Ex. D-4 and B; 268a and 269a).

Two Judgments in the amount of $29,318 were therefore entered with the above Order: (1) in favor of plaintiff against defendant Lipshutz and (2) in favor of Lipshutz against third party defendant Kohn on the claim for indemnity.

Appeals From the Second Trial.

Three separate appeals were filed with the Court of Appeals for the Third Circuit, one by each party in the case. All of the appeals concerned the effect of the Release and Covenant Not to Sue upon the judgments against Lipshutz and Kohn.

Appeals of Lipshutz and Kohn. In the appeals by Lipshutz and by Kohn, it was argued that Lipshutz is discharged from any vicarious liability for the negligence of Kohn. The basis of such argument is: the release of the person primarily liable (Kohn), completely discharges Lipshutz, who is *only* vicariously or secondarily liable for the negligence of Kohn. Further, if Lipshutz is completely discharged, then Kohn cannot be liable on the third party claim.

The Court of Appeals, in its Opinion filed April 1, 1966 (pages 2a to 10a, *infra*), affirmed the decision of District Judge Lord on this point and held that Lipshutz is not completely discharged from vicarious liability.

Appeal of plaintiff. In plaintiff's appeal, he argued that the release did not even operate as a credit to reduce

the amount of the judgment against defendant Lipshutz by the amount of money paid for the Release.

In other words, plaintiff urged that he is entitled to $60,000 *more* than the total damages of $89,318 which were awarded by the jury.

Plaintiff's theory is that because the Hospital was not on the record as a third party defendant, there has been no judicial determination of the liability of the Hospital. The Court of Appeals agreed and held that the Release does not reduce the claim against Dr. Lipshutz by the amount of money paid for the Release.

The Court of Appeals recognized that under the Pennsylvania Uniform Contribution Among Joint Tort Feasors Act, (July 19, 1951 P. L. 1130; 12 P. S. 2082), and under Pennsylvania common law, the release of one person who is liable for an injury, does reduce the claim against other persons who are liable for the same injury by the amount of the money paid for the release.

However, the Court of Appeals decided that the released person must be a party on the record so that it can be determined that such person is liable for the injury.

Because the Hospital was not on the record in the Lipshutz case and although there was a Special Finding by the jury that an employee of the Hospital was negligent, the Court below held that there was no judicial determination of the Hospital's liability. Therefore, the Court ruled, the release of the Hospital did not operate to reduce the claim against Lipshutz.

Accordingly, the Court decided that Lipshutz and, in turn, Kohn were liable for the full $89,318.

On plaintiff's appeal, the Court of Appeals failed to consider the fact that two separate juries had found that an employee of the Hospital was negligent.

Even more significantly, the Court did not recognize that *Albert Kohn* (who was also discharged by the Release and Covenant Not to Sue for the $60,000) *was* on the record as a third party defendant and *was* judicially held to be liable.

The Circuit Court's decision produces a result that enables the plaintiff to receive $60,000 *more* than the total damages of $89,318, which was the plaintiff's entire loss as found by the jury.

Furthermore, Albert Kohn (one of your Petitioners) has been held liable over to Petitioner Lipshutz for the entire $89,318 even though he was released by the $60,000 settlement.

As apparent justification for the anamolous result thus reached, the Court of Appeals, at page 9 of its Opinion, stated ". . . in passing that the total amount of the damages which plaintiff will receive is an extremely modest sum in view of the damages proven."

REASONS FOR GRANTING THE WRIT.

For the following reasons, the Court of Appeals has erred in deciding important questions directly in conflict with both statutory and common law of Pennsylvania and fundamental principles regarding the effect of a Release.

1. Under statutory law of Pennsylvania, the release of the *Hospital* operated to reduce the judgment against defendant Lipshutz by the amount of money paid for the Release—but the Court below refused to grant such reduction.

2. Under statutory law of Pennsylvania, the release of third party defendant, *Albert Kohn,* operated to reduce the judgment against defendant Lipshutz by the amount of money paid for the Release—but the Court below refused to grant the reduction.

3. It is well-established common law of Pennsylvania that an injured party may have but one satisfaction from wrongdoers. Upon receipt by the injured party of a partial satisfaction from one wrongdoer, credit must be given in such amount to others who are held liable for the same injury. The Court refused to give credit to defendant Lipshutz. Such decision is in direct conflict with Pennsylvania common law.

4. Third party defendant Kohn has been held liable over for plaintiff's total damages of $89,318. Under the ruling of the Court below, Kohn himself receives no credit for the $60,000 which was paid for his Release. Such result is contrary to Pennsylvania law and basic principals of unjust enrichment.

5. The Release of the "servant", Albert Kohn, operated to completely discharge his master, Dr. Lipshutz, from any vicarious or secondary liability. The Court of Appeals erred in refusing to rule that Lipshutz was discharged by the Release of his servant.

1. The Release of the Hospital Reduces the Judgment Against Lipshutz Under Pennsylvania Statutory Law.

Under the Pennsylvania Uniform Contribution Among Joint Tort Feasors Act (July 19, 1951, P. L. 1130; 12 P. S. 2082), the release of the Hospital operates to reduce the judgment against Dr. Lipshutz by the amount of money paid for the release.

Section 4 of the above statute says, "A release by the injured person of one joint tort feasor, whether before or after judgment, does not discharge the other tort feasors unless the release so provides, *but reduces the claim against the other tort feasors in the amount of the consideration paid for the release. . . .*" (Emphasis supplied)

Plaintiff executed a Release, and Covenant Not to Sue the Hospital, its agents and employees, for $60,000. Plaintiff admits the authenticity of the release and the receipt of the $60,000 consideration (R. 159a). However, the Court held that the statute does not apply because the Hospital was not on the record as a third party defendant. The Court of Appeals agreed.

The legal basis of the Court's decision is that there has been no judicial determination that the Hospital was liable.

This, despite the fact that in the companion case, consolidated for trial with the Petitioners' case, the jury found that an employee of the Hospital was negligent—and in the Petitioners' case, the jury identified this employee as Albert Kohn, an admitted employee of the Hospital who was in charge of the blood bank. However, on the narrow ground that the Hospital per se was not on the record (the lower court had earlier refused Petitioner Lipshutz the right to join the Hospital) the Court swept away the substantive rights of the Petitioners to have Dr. Lipshutz's liability reduced even though the findings at two trials logically established the Hospital's responsibility beyond doubt.

No Pennsylvania case holds what the Court of Appeals has decided in this case. The law of Pennsylvania is that

a defendant, in the position of Dr. Lipshutz, *should* be permitted to join a released person so that the liability or non-liability of the released person can be determined. *Davis v. Miller,* 385 Pa. 348 (1956). In the instant case, juries in two separate trials have determined that an employee of the Hospital was negligent and that such negligence caused the injury and death. The decision of the Court of Appeals is in conflict with Pennsylvania law.

2. Aside From the Release of the Hospital, the Release of Third Party Defendant Kohn Reduces the Judgment Against Lipshutz Under Pennsylvania Statutory Law.

Under the Pennsylvania Uniform Contribution Among Joint Tort Feasors Act, *supra,* the release of Albert Kohn, who *was* judicially held to be liable for plaintiff's injuries, reduces the judgment against Lipshutz by the amount of money paid for the release.

It is conceded by everyone that under Pennsylvania law, a Covenant Not to Sue is the same as a Release. *Caplan v. Pittsburgh,* 375 Pa. 268, 272 (1950).

The Covenant Not to Sue in the instant case (Ex. D-4 A & B; 268a and 269a) states: "We (Plaintiff) reserve the right to make claims against any and every person, association or corporation other than Albert Einstein Medical Center (Hospital), its agents and *employees* . . ." (Emphasis supplied). The release goes on to reserve rights to make claims against certain doctors, including Dr. Lipshutz.

District Judge Lord directed the finding that Albert Kohn was an employee of the Hospital (R. 255a, 256a). The evidence clearly shows that he was a Hospital employee. Accordingly, the Release and Covenant Not to Sue the Hospital, its agents and *employees,* was a release of Albert Kohn.

There is no question that it had been judicially determined in this action that *Kohn* is liable for plaintiff's injuries. Kohn was a third party defendant in this lawsuit;

the jury found Kohn liable; and judgment against Kohn has been entered.

Under the Pennsylvania Uniform Act, *supra,* where two persons are jointly *or* severally liable in tort for the same injury, a release of one reduces the claim against the other by the amount of money paid for the release. *Daugherty v. Hershberger,* 386 Pa. 367 (1956).

Nevertheless, the Court of Appeals refused to reduce the judgment against Lipshutz (and against Kohn). Its decision is in serious conflict with Pennsylvania law.

3. Under Pennsylvania Common Law Credit Must Be Given to Defendant Lipshutz for the Amount Which Was Paid to Plaintiff for the Release.

It is well-established common law of Pennsylvania "that for the same injury, an injured person may have but one satisfaction, and the receipt of such satisfaction, either as payment of a judgment recovered *or as consideration for a release executed by him from a person liable for such injury,* necessarily works a release of all others liable for the same injury," and furthermore, if an amount less than the total damages has been paid to plaintiff for a release, credit must be given for such amount to other persons liable for the same injury. (Emphasis supplied.) See *Brown v. Pittsburgh,* 409 Pa. 357, 363 (1962).

The *Brown* decision rules our case. In *Brown,* the defendant, City of Pittsburgh, could be only secondarily liable for negligence of a landowner regarding the maintenance of a sidewalk. But the landowner had previously been released by the plaintiff for a money consideration. The Court held that if any judgment was recovered against the defendant City "which will establish the fact that the landowner was negligent and a wrongdoer—", "credit must be given (to the City) for the sum already paid" for the release of the landowner.

Likewise, Lipshutz is only secondarily liable for the negligence of Kohn. Dr. Lipshutz himself was exonerated

of any negligence. The fact that Dr. Lipshutz was found liable established in itself that Kohn was negligent and a wrongdoer. Therefore, under Pennsylvania law, credit must be given to Lipshutz for the sum already paid to plaintiff under the Release which discharged Kohn.

The Court of Appeals ignored the substantive requirement of Pennsylvania law and has refused to give defendant, Lipshutz credit for the money consideration paid for the Release. Such decision is in conflict with an important rule of law of Pennsylvania.

Furthermore, the Court's decision is in direct conflict with decisions of other United States Courts of Appeals on the same issue.

In *Schomacher v. Rosenthal,* 226 F. 2d 946 (7th Cir. 1955), the Court of Appeals for the Seventh Circuit affirmed the reduction of recovery by the amount received by the plaintiff for the release of the negligent *agent* of the defendant. The Court followed and applied the Illinois rule (identical to that in Pennsylvania) that any amount received by plaintiff for the execution of a release of a tort feasor is to be applied in reduction of the damages recoverable from any remaining tort feasors.

Likewise, in *Harrington v. Texaco,* 339 F. 2d 814 (5th Cir. 1965), the Court recognized the principle of law that anything received in settlement from a tort feasor must be set off as credit against the amount recovered in court from other tort feasors. The applicable state law (Texas) is the same as Pennsylvania law on this point.

See also *Friday v. United States,* 239 F. 2d 701 (9th Cir. 1957) and *Ford Motor Company v. Tomlinson,* 229 F. 2d 873 (6th Cir. 1956).

The Circuit Courts of Appeals in the above cases all decided that the recovery against a defendant tortfeasor must be reduced by the amount paid to plaintiff for the release of other tortfeasors. The applicable state law in each instance was basically the same as Pennsylvania law. The Court below in the case at bar, however, controlled by the very same substantive rule of law, rendered a decision

directly opposite and in conflict with decisions of the other Courts of Appeals.

This further demonstrates that the Court below misapplied Pennsylvania law.

4. Under the Ruling of the Court of Appeals, Third Party Defendant Kohn Is Liable Over for Plaintiff's Total Damages of $89,318 and Kohn Himself Receives No Credit for the $60,000 Which Was Paid to Plaintiff as Consideration for His Release.

Defendant Lipshutz was himself exonerated from any negligence but has been held vicariously or secondarily liable for the negligence of Albert Kohn. Lipshutz, therefore, has the right of full indemnity against Kohn for any damages suffered by Lipshutz by reason of Kohn's negligence. Cf. *Builders Supply Co. v. McCabe,* 366 Pa. 322 (1954).

Consequently, if Lipshutz must pay plaintiff's full damages of $89,318, then third party defendant Kohn is liable to Lipshutz in the same amount.

Your Petitioner, Kohn, was released by plaintiff for a consideration of $60,000. If Kohn now must pay the full amount of plaintiff's damages, then he will not even have received credit for the $60,000 paid to plaintiff for his Release. Such a result is in conflict with Pennsylvania law and basic principles of unjust enrichment.

This result violates the very foundation and intent of the Uniform Contribution Among Joint Tortfeasors Act because although Kohn has been released, Kohn must again respond in damages. See Sections 5 and 6 of such Statute (page 4, *supra*).

5. The Release of Albert Kohn Operated to Completely Discharge Dr. Lipshutz From Any Vicarious or Secondary Liability for the Negligence of Mr. Kohn.

Finally, it is a fundamental rule of law that where an injured party releases a servant, whose negligence caused the injury, such release also operates to discharge the

servant's master, whose liability is based solely upon vicarious responsibility for the negligence of his servant. *Terry v. Memphis Stone & Gravel Co.*, 222 F. 2d 652 (6 Cir. 1955); *Minery v. Fenton*, 29 N. J. 409; 149 A. 2d 245 (1959).

If plaintiff is permitted to recover from Lipshutz, the release of Kohn will be nullified. Kohn still stands liable to his "master" Lipshutz. If Lipshutz is not completely discharged by the release in the instant case, then Kohn is obligated to pay the money judgment to plaintiff, though indirectly.

Further, when a servant is discharged by a release, the foundation for any claim against the master is removed. The liability of the master is solely derivative, resting only upon the negligence of the servant. *Simpson v. Townsley*, 283 F. 2d 743 (10 Cir. 1960).

The Court below has rendered a decision in conflict with the fundamental rule of law that a release of a servant discharges his master.

CONCLUSION.

For all of the foregoing reasons, your Petitioners respectfully request this Honorable Court to grant a Writ of Certiorari upon the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Appendix.

ORDER OF THE DISTRICT COURT.

AND Now, this 30th day of April, 1965, it is ORDERED as follows:

1. The motion of the defendant Hattie Lipshutz, Executrix of the Estate of Dr. Benjamin Lipshutz for judgment notwithstanding the verdict is DENIED.

2. The motion of defendant Hattie Lipshutz, Executrix of the Estate of Dr. Benjamin Lipshutz for a new trial, is DENIED.

3. The motion of defendant Hattie Lipshutz, Executrix of the Estate of Dr. Benjamin Lipshutz to amend the judgment is GRANTED, and the judgment against said defendant is hereby reduced to the amount of $29,318.00.

4. The motion of the third party defendant Albert Kohn for judgment notwithstanding the verdict is DENIED.

5. The motion of the third party defendant Albert Kohn to amend the judgment is GRANTED, and the judgment in favor of the third party plaintiff and against the third party defendant is hereby reduced to the amount of $29,318.00.

By THE COURT,

JOSEPH S. LORD, III,
JOSEPH S. LORD, III, *J.*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

Nos. 15447, 15448 and 15449

MILTON MAZER, ADMINISTRATOR OF THE ESTATE OF ISRAEL ABRAMS, DECEASED,
Appellant in No. 15448,

v.

HATTIE LIPSHUTZ, EXECUTRIX OF THE ESTATE OF BENJAMIN LIPSHUTZ, DECEASED,
Appellant in No. 15447,

v.

ALBERT KOHN,
Third-party Defendant,
Appellant in No. 15449.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued February 11, 1966

Before McLAUGHLIN, FORMAN and GANEY, *Circuit Judges.*

OPINION OF THE COURT

(Filed April 1, 1966)

By McLAUGHLIN, *Circuit Judge.*

In this medical malpractice action the wrong type of blood was administered to plaintiff's decedent during the course of an operation upon him. In addition, one of two sponges left in the patient after the completion of the operation was never removed. At the first trial there were judgments in favor of the surgeon in charge, Dr. Lipshutz and the anesthesiologist, Dr. Chodoff. On appeal we reversed the judgment in favor of Dr. Lipshutz and ordered

a new trial. We affirmed the judgment in favor of Dr. Chodoff. Mazer v. Lipshutz, 327 F.2d 42 (3 Cir. 1963), rehearing den. 1964. He held pp. 45, 46, "There was ample evidence that the administration of the wrong type of blood was a substantial factor in causing his death and also that it was the sole cause of death. There was also proof that the unremoved sponge was a contributing cause." We restricted the new trial to "Dr. Lipshutz's vicarious liability in relation to Kohn as delineated above." (p. 52). Kohn was the "head technician in charge of the hospital's blood bank," (p. 44). He was a third-party defendant.

At the second trial the jury found Dr. Lipshutz was vicariously liable for the negligence of Kohn and rendered a verdict in favor of the plaintiff and against the Estate of Dr. Lipshutz for $89,318 and for the same amount in favor of the Estate of Dr. Lipshutz and against Kohn. As in the first trial, a release and covenant not to sue by plaintiff releasing the hospital and its employees for a consideration of $60,000 had been put into evidence outside the hearing of the jury. On defense motions, the trial judge, taking into consideration the $60,000 paid by the hospital, reduced both judgments to $29,318. Plaintiff has appealed from the reduction of the amount of his judgment. The Lipshutz estate and Kohn have appealed from the order refusing to grant them judgments n.o.v.

The defense argument against plaintiff's judgment centers around the above mentioned release. We note that this affirmative defense was never pleaded on behalf of Lipshutz. Though this is a clear violation of Federal Rule of Civil Procedure 8(c) we do not find even a mention of it in the Lipshutz briefs. There was no objection to the admission of the release into evidence because of non compliance with Rule 8(c). The release was admitted into evidence. It was also in evidence at the first trial. Under the circumstances, the point on appeal that the failure to plead the release affirmatively forecloses the defense relying on it has no validity.

This brings us to the substantial question on the merits namely, whether the release plaintiff gave the hospital merely reserved his rights against Dr. Lipshutz for any individual negligence on his part and so excluded vicarious liability of Dr. Lipshutz. The document in question is a Pennsylvania joint tort feasor release under the Contribution Among Tort Feasors Act of that Commonwealth (12 P.S. 2082-2089). It releases the hospital, its successors and assigns from all claims arising out of the injuries sustained by the plaintiff's decedent in the accident involved. Then follows in pertinent par the controverted paragraph:

> "We reserve the right to make claims against any and every person, association or corporation other than Albert Einstein Medical Center, its agents and employees, expressly excluding from this release and reserving rights particularly to claims against Dr. Benjamin Lipschutz, Dr. Peter Chodoff and Dr. David Meranze and any other physician attending the decedent, on account of the accident, injuries and damages sustained by us at the time and place above mentioned. We reserve also the right to claim that such other person, association or corporation is solely liable to us. But for the consideration paid us herein, we further agree that execution of this release shall operate as a satisfaction of our claims against any person, association or corporation other than Albert Einstein Medical Center to the extent of the pro rata share of common liability of Albert Einstein Medical Center."

The exact same issue was raised by the Lipshutz defense in the first appeal. In our opinion, after stating the facts, we held, Mazer v. Lipshutz, supra, p. 50:

> "In view of the foregoing it follows that the jury under proper instructions would have been entitled to find Dr. Lipschutz, as the captain of the ship, vicariously liable for the administration of incompatible blood to Professor Abrams."

Later on in the opinion, pp. 54-55, we took up the defense contention that the release barred recovery by the plaintiff against Dr. Lipshutz for vicarious liability and said:

> "Dr. Lipschutz's executrix asserts that a release executed by the plaintiff in favor of the hospital, its agents, and employees, but expressly reserving rights against Dr. Lipschutz, bars the plaintiff from recovering a judgment against the doctor. Appellee's argument is pitched on the ground that the situation presented is not one of joint tort-feasors but one of primary and secondary liability. Therefore, she asserts, if the one primarily liable be discharged, the release operates to discharge anyone secondarily responsible, citing the Restatement, Security, Section 122. But the executrix has mistaken the positions of the hospital and of Dr. Lipschutz. They were joint tortfeasors, both vicariously liable. In any event, Section 122 of the Restatement provides that the surety is not discharged if as here, 'the creditor in the release reserves his right against the surety.' The law of Pennsylvania on the subject of joint tortfeasors is clearly applicable to this issue and decides it in favor of the plaintiff. See 12 P.S. Section 2082-2089."

We find no justification for the defense position that the true meaning of the release is that it only excludes what is designated as "individual negligence" of Dr. Lipshutz. The latter has been found to be a principal in the operating room, the captain of the operating ship. As such he then, just as much as the hospital, was a primary tort-feasor. Kohn was an employee of the hospital. Kohn, during the operation, was also a subordinate of Dr. Lipshutz who was in charge of the operation. The release to the hospital, its agents and employees on its face did not release Kohn as a vitally important aid of the surgeon in the latter's overall

performance of the operation. The hospital was not a party to the Lipshutz suit. There is no judicial finding anywhere in the litigation that Kohn during the operation was acting as an agent of the hospital. The exclusion from the release of plaintiff's rights against Dr. Lipshutz contains no restriction whatsoever. It protects plaintiff's "*claims against Dr. Benjamin Lipshutz * * * on account of the accident, injuries and damages sustained by us at the time and place above mentioned.*" (Emphasis supplied). All liability of Dr. Lipshutz is clearly included in that unambiguous language. To say that it wiped out the doctor's responsibility for the conduct and acts of his technical assistants merely because they were also employees of the hospital is to misread the release itself and all of the pertinent facts. Pennsylvania law which governs upholds the sound doctrine that a servant may have two masters at one time. McConnell v. Williams, 361 Pa. 355, 361 (1949) dealt with a surgical operation with collateral negligence by a hospital intern who was assisting the surgeon in charge at the latter's request. The court held that the intern "* * * thereby became—or at least so a jury might find—his temporary servant for the purpose for which he was engaged". To the same effect Restatement of Agency § 226, Siidekum v. Animal Rescue League, 353 Pa. 408 (1946). Beyond doubt the release here did not release the principal Lipshutz from any of his responsibility arising out of the operative procedure. The hospital employee Kohn was functioning as the agent of the operating surgeon during the critical period. The negligence of which he was found guilty at that time was properly attributed to his superior, Dr. Lipshutz.

We have examined appellant's other specific points on this question. They are without merit and need no discussion.

The remaining problem before us concerns the reduction by the trial judge of plaintiff's verdict against the defendant Lipshutz from $89,318 to $29,318. The judge, on

application of the defense, subtracted the amount paid by the hospital for its release from plaintiff's verdict against Lipshutz. Whether this was correct depends entirely upon Pennsylvania law.

The hospital was never made a defendant in the Lipshutz suit. Actually, apparently because the six months time limit for such a motion had expired, a motion to that end was denied. The Lipshutz action and that against Dr. Chodoff were consolidated for trial purposes only. Dr. Chodoff had a verdict in his favor in his case at the first trial. The second trial was as to the claim against Lipshutz alone with, as we have seen, a verdict against the representative of his estate.

On behalf of Lipshutz it is argued that the Uniform Contribution Among Tortfeasors Act of July 14, 1951, P.L. 1130 (12 P.S. 2082), makes the deduction mandatory of the money paid by the hospital for the release of it. Reliance is placed on Sections 1 and 4 of the Act which read:

Section 1:

> "For the purposes of this act, the term 'joint tortfeasors' means two or more persons jointly or severally liable in tort for the same injury to persons or property, whether or not judgment has been recovered against all or some of them."

Section 4:

> "A release by the injured person of one joint tortfeasor whether before or after judgment, does not discharge the other tortfeasors unless the release so provides but reduces the claim against the other tortfeasors in the amount of the consideration paid for the release or in any amount or proportion by which the release provides that the total claim shall be reduced if greater than the consideration paid."

The obvious difficulty with the Lipshutz theory is that admittedly there has been no judicial determination as to the alleged negligence of the hospital. Pennsylvania case

law is specific in upholding this sine qua non requirement. In Davis v. Miller, 385 Pa. 348 (1956) which is the landmark Pennsylvania decision on the subject, there was a collision between an automobile operated by Mary Richardson and one driven by Amos Miller. Three passengers in the Richardson car sued Miller. The latter sued the Richardson driver and made her an additional defendant. It developed that Mary Richardson had a release from Miller and releases from her passengers. She moved for judgment on the pleadings. The court sustained this and discharged her from the case. Miller appealed. As the Supreme Court stated p. 349:

> "It is appellant's contention that notwithstanding the releases held by the additional defendant she should be retained in the case until a jury can determine whether or not she was a joint tortfeasor."

The Court functioning specifically under the above quoted Uniform Contribution Among Tortfeasors Act quoted inter alia the provision relied on here, saying pp. 351-352:

> "All the releases from the plaintiffs to the additional defendant were given in pursuance of that Act, and they each provided 'That any damages, recoverable by the Undersigned, against or from all the other joint tortfeasors, shall be reduced to the extent of the pro rata share of said damages which the parties released hereby, except for this release, would otherwise have to pay.' It is therefore clear that an important factor in the determination of the amount of damages that Miller may be required to pay to plaintiffs is whether or not Mary Richardson would also have been liable to them had they not released her,—in other words, whether she was a joint tortfeasor with Miller. If such she was, then, under the Act and the terms of the releases which plaintiff gave her, they can recover from Miller only his pro rata share, in this case half,

of the amount to which they otherwise would have been entitled; if, on the other hand, she was not a joint tortfeasor, the releases given her by plaintiffs would not inure to Miller's benefit: Koller v. Pennsylvania Railroad Company, 351 Pa. 60, 40 A. 2d 89. Therefore, although Miller cannot recover contribution from the additional defendant, he does have an extremely valuable right in retaining her in the case, because, if the jury should find her to be a joint tortfeasor, his liability to plaintiff would be cut in half. Her continuance in the case is therefore necessary, even though no recovery can be had against her either by plaintiffs or by defendant, in order to determine the amount of damages that defendant may be obliged to pay plaintiffs in the light of the situation created by their releases of the additional defendant's liability."

To the same effect Long v. Thomasberger, 14 D & C 2d 30 (1958); Dice v. Marsolino, 14 D & C 2d 457 (1958). See also Polley v. Atlantic Refining Co., 417 Pa. 549, 556-557 (1965).

The defendant makes no real attempt to refute the solid law of the Davis opinion and the decisions following it. Daugherty v. Hirshberger, 386 Pa. 367 (1956) is cited by defendant but the opinion written by Chief Justice Stern, the author of the Davis opinion, recognizes the authority of the latter and simply holds that it "has no bearing on the present issue." Brown v. Pittsburgh, 409 Pa. 357, 363-364 (1962) also referred to by the defense, is of material help to the plaintiff. Its finding was: "Therefore, if any judgment is recovered against the City *which will establish the fact that the Church was negligent and a wrongdoer,* albeit one protected by an immunity from liability for its negligence, credit must be given for the sum already paid." (Emphasis supplied). As has been noted the hospital involved in the instant claim was not a party to the pending cause and there is no judicial judgment of negligence

against it. Pillo v. Reading Co., 232 F.Supp. 761 (E.D. D.C.Pa. 1964), the remaining citation of the defense, holds that "It is horn book law *that a satisfied judgment against one co-obligor or joint tortfeasor bars suit against others jointly responsible for the same injury.*" (Emphasis supplied). This merely lends strength to the rightness of the Mazer plaintiff's full recovery of his judgment. The amount paid by the hospital was the ordinary buying of peace on the part of one concerned in a person's claim for damages arising out of an alleged tort. It was not the act of a tort-feasor, so established by a judgment against it which it has paid and satisfied.

The unjust enrichment argument which the defense attempts to raise is never reached and cannot be reached within the particular dimensions of this appeal. We are dealing with an ordinary malpractice tort case in which all the parties are entitled to the full benefit of the ruling state law. That law firmly holds that if the defense desired that the hospital peace payment be deducted from any plaintiff's verdict as the sum paid by a joint tort-feasor, the hospital should have been joined as a defendant and its tort-feasor liability fixed under the explicit Pennsylvania law. If that doctrine needs to be changed the matter should be called to the attention of the Pennsylvania legislature. We are bound to function in this type of litigation under the state law as it now exists. We state in passing that the total amount of damages which plaintiff will receive is an extremely modest sum in view of the damages proven.

In Nos. 15447 and 15449 the District Court order denying the motions for judgment n.o.v. of the defendant and of the third-party defendant will be affirmed.

In Nos. 15448 and 15449 the District Court order amending the amount of the plaintiff's judgment against the defendant Lipshutz and the judgment of the latter against the third-party defendant Kohn will be vacated and the case remanded to the District Court for the purpose of reinstating the original judgments in the sum of $89,318 in each instance.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS.

Present: McLaughlin, Forman and Ganey, *Circuit Judges.*

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that that part of the District Court order, filed April 30, 1965, which denied the motions for judgment n.o.v. of the defendant and of the third-party defendant, be and it hereby is affirmed; that that part of the order of the District Court, filed April 30, 1965, which amended the judgment in favor of the plaintiff against the defendant Lipshutz and the judgment in favor of defendant Lipshutz and against the third-party defendant Kohn, be and it hereby is vacated, and the case is remanded to the District Court with directions to reinstate the original judgment, filed October 20, 1964, in the sum of $89,318.00, and as so reinstated, the judgment be, and it hereby is affirmed. Costs taxed in favor of plaintiff.

Attest:

Ida O. Creskoff,
Clerk.

April 1, 1966

ORDER OF UNITED STATES COURT OF APPEALS SUR PETITION FOR REHEARING.

Present: STALEY, *Chief Judge*, and KALODNER, MCLAUGHLIN, HASTIE, FORMAN, GANEY, SMITH and FREEDMAN, *Circuit Judges*.

The petition for rehearing filed by Hattie Lipshutz, Executrix of the Estate of Benjamin Lipshutz, deceased, for a rehearing limited to Appeals Numbers 15,448 and 15,449 in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

MCLAUGHLIN, *J.*

Dated: May 10, 1966

OPINION OF THE COURT OF APPEALS RENDERED DECEMBER 30, 1963.

Before BIGGS, *Chief Judge,* and MCLAUGHLIN and GANEY, *Circuit Judges.*

BIGGS, *Chief Judge.*

Jurisdiction in the suits at bar is based on diversity and jurisdictional amount. The operative facts occurred in Pennsylvania and the law of that Commonwealth therefore is applicable. The jury could have found the following from the evidence.

Israel Abrams was an Assistant Professor of Mathematics at Drexel Institute and was admitted to The Albert Einstein Medical Center, Southern Division, in Philadelphia, on December 17, 1957, on the surgical service of Dr. Benjamin Lipschutz for elective[1] gall bladder surgery. Professor Abrams was placed in Room 807. On the same day another patient, also named Israel Abrams, was admitted to the hospital and was put in Room 342. Albert Kohn, head technician in charge of the hospital's blood bank, and Dr. Peter Chodoff, the anesthesiologist who was to serve and who did serve at Professor Abrams' operation, acting independently of each other, checked the operating schedule on December 18, the day before Professor Abrams' operation took place. On that day Dr. Chodoff ordered the blood bank to set aside two bottles of blood for Professor Abrams. Kohn checked the hospital census and found that an Israel Abrams was registered in Room 342. He called the "I-V" (Intravenous) team and ordered that a specimen of that Israel Abrams' blood be typed. On typing, this blood was found to be type "A." About mid-afternoon on December 18,

1. The operation is described as "elective" because it was not emergent and was scheduled to take place near the beginning of the winter recess of Drexel Institute.

Kohn was informed there were two Israel Abrams in the hospital. He checked with the operating room and found that Professor Abrams was in Room 807 and it would seem, though the record is not clear on this point, that he then called for a specimen of the Professor's blood for typing. A specimen of blood was delivered to him.

On the morning of the operation, which took place on December 19, a bottle of blood was placed in the operating room for use in connection with Professor Abrams' operation. Dr. Chodoff stated that the bottle of blood was labeled "Israel Abrams" and that the operating room chart showed that the bottle was marked "342 A Positive." Kohn testified that he himself put the label on this bottle. The operation was proceeded with by Doctor Lipschutz as the operating surgeon and during its course, Professor Abrams' cystic artery was severed. Professor Abrams went into shock and blood was imperatively required. Dr. Chodoff looked at the bottle of blood and noticed immediately that it was labeled in substance as stated.

Kohn was summoned to the operating room and was asked by Dr. Chodoff about the apparently erroneous labeling of the bottle of blood. Kohn told Dr. Chodoff that the room number was a clerical error, that the blood was of the correct type and that it was proper to give it to Abrams.[2] According to Dr. Chodoff, Kohn stuck his head through the open operating room door. According to Kohn's testimony, he talked to Dr. Chodoff in the operating room through the open door of the adjacent scrub room. Both Dr. Chodoff and Kohn agreed that they were separated by a distance of about five feet. One pint of blood was given from the

2. Kohn testified during a pretrial deposition and again early in the trial that he was not aware until after the operation that there were two Israel Abrams in the hospital. He stated also that blood had been taken from only one Israel Abrams for the blood bank. But when a written statement, which pretrial discovery methods had failed to elicit, was shown to him he testified that he did know there were two Israel Abrams in the hospital and that blood had first been drawn for the blood bank from the Israel Abrams in Room 342.

bottle, marked as we have stated, to Professor Abrams. Five other pints of blood were also given to him. There was evidence from which the jury could have inferred that some of the blood given to Professor Abrams was of an incompatible type. The trial court stated in its charge: "[I]t seems to be taken without argument that there was a wrong room number on the bottle of blood."

A sponge count was taken after the incision in Professor Abrams' abdomen had been closed and it was found that two sponges were missing. Approximately one-half hour after the operation, Dr. Lipschutz returned Professor Abrams to the operating room, reopened his abdomen, and removed one sponge but left the other within the patient.

On December 23, Professor Abrams, then suffering from acute kidney failure, a transfusion reaction, was transferred by Dr. Lipschutz to the University of Pennsylvania Hospital and put under the care of Dr. Lewis Bluemle, a specialist in the use of the artificial kidney. Dr. Bluemle testified that Dr. Lipschutz twice denied knowledge of the occurrence of any transfusion reaction. Dr. Bluemle testified that on the second denial, "I rather abruptly telephoned the blood bank of the Albert Einstein Hospital in Dr. Lipschutz's presence and asked the technician in charge the blood type of Mr. [Professor] Abrams and was told it was Type O, Rh-positive. * * * I presented this information to Dr. Lipschutz at that time and he said yes, there was a possibility that a transfusion reaction had occurred * * *." Dr. Bluemle also testified that because of increasing pain suffered by Professor Abrams in the right upper part of the abdomen and in the shoulder, indicating something wrong in the area of the liver or in the area of the right diaphragm, an X-ray was taken of this area at the University of Pennsylvania Hospital and the sponge remaining in the patient's abdomen was discovered. Dr. Bluemle stated that "the presence of a foreign body of this sort in the abdomen can hasten the development of uremia * * *."

Professor Abrams died on January 4, 1958. There was ample evidence that the administration of the wrong type of blood was a substantial factor in causing his death and also that it was the sole cause of death. There was also proof that the unremoved sponge was a contributing cause. Two suits were brought by Professor Abrams' administrator. One (C. A. No. 25,749 in the court below) was originally filed against Dr. Lipschutz and continued after his death against his executrix as substituted party. The second suit (C. A. No. 27,438 in the court below) was filed against Dr. Chodoff, the anesthesiologist whose admitted duty it was to administer and who did in fact administer the blood transfusions. The two cases were consolidated for trial and, properly, were tried together.[3]

Three interrogatories were submitted to and answered by the jury on the issue of fault. The interrogatories and the jury's answers to them were as follows: "1. Was there negligence on the part of Dr. Chodoff which was a contributing cause of the death of Israel Abrams?", "Answer: No."; "2. Was there individual negligence on the part of Dr. Benjamin Lipschutz which was a contributing cause of the death of Israel Abrams?", "Answer: No."; "3. Was there negligence on the part of any employee of Albert Einstein Medical Center, Southern Division, other than Dr. Chodoff['s] which was a contributing cause of the death of Israel Abrams?", "Answer: Yes." After the third interrogatory the court gave the following instruction: "If you answer any or all of the foregoing questions 'yes,' then answer the following." The "following" questions related to the amounts of damage, if any, suffered by the plaintiff. Because the plaintiff had previously executed a release in favor of the hospital, in the light of the two exculpatory

3. The jury awarded $41,365 under the Survival Act (20 P. S. § 320.601 et seq.), and $47,953 under the Wrongful Death Act (12 P. S. § 1601 et seq.). Damages against Dr. Lipschutz were claimed on the basis of both Acts. Damages against Dr. Chodoff were asserted on the basis of the Survival Act only. The application of these Pennsylvania Acts is not in issue here.

answers of the jury, the findings, with the consent of the parties, were molded into verdicts in favor of the two individual defendants. The plaintiff then filed in the suit against Lipschutz's executrix (C. A. No. 25,749 in the court below) a motion to set aside the judgment and enter judgment for the plaintiff, and, in the alternative if the first motion was denied, a motion for a new trial. In the case against Dr. Chodoff (C. A. No. 27,438 in the court below), in which Dr. Lipschutz's executrix and the Albert Einstein Medical Center were joined as third-party defendants, the plaintiff filed a motion for a new trial. The motions were denied and the appeals at bar followed. The appeal from C. A. No. 25,749 is at our No. 14,238; that at C. A. No. 27,438 is at our No. 14,239.

The plaintiff has asserted a number of grounds in this court as to why the judgment should be reversed and the verdict molded and judgment entered against Dr. Lipschutz's executrix for the amounts awarded as damages by the jury, and in the alternatvie that a new trial be granted. In Dr. Chodoff's case the plaintiff contends that a new trial should be granted.

The first ground for reversal asserted by the plaintiff is bottomed on the "Captain-of-the-Ship" doctrine and is to the effect that under the law of Pennsylvania the operating surgeon, Dr. Lipschutz, as the captain of the ship was legally responsible for the negligence which caused Professor Abrams' death. The plaintiff cites three Pennsylvania cases to support his position.

The first of these is McConnell v. Williams, 361 Pa. 355, 65 A. 2d 243 (1949). In this case Mrs. McConnell consulted the defendant doctor to attend her during a pregnancy and to deliver her child. The doctor found that a caesarian operation was necessary and caused it to be performed at a Philadelphia hospital where he was one of the chiefs of the obstetrical staff. The hospital was a nonprofit, charitable institution with both private-patient and ward service, its facilities being available to all persons. The

defendant doctor requested one of the hospital internes to attend on the day of the caesarian operation "to be his assistant and to take care of the baby at the time of the operation," but being told that that interne would not be on duty he asked that a certain other interne should be informed that "he was to be his assistant and take care of the baby at the time of the delivery." The operation took place as scheduled and there were present in addition to the defendant doctor and the patient a nurse attached to the hospital, another nurse privately engaged by the patient, and the interne whom the defendant doctor had last designated.

The patient suffered profuse hemorrhages which required the defendant doctor's complete attention. When the child was delivered he turned it over to the interne for the purpose of tying the umbilical cord and applying a solution of silver nitrate to its eyes, the latter service being required by the rules and regulations of the Department of Health of the Commonwealth of Pennsylvania. According to the testimony the interne filled a syringe and squirted the solution once into the child's left eye and twice into its right eye, putting into the latter "a great many drops," and failed to irrigate the eyes during at least the following five or ten minutes. The child lost the sight of its right eye and its left eye was severely and permanently scarred. The defendant doctor testified that the insertion of silver nitrate drops was not a task that required any special skill. Mr. Justice (later Mr. Chief Justice) Horace Stern said that the plaintiffs did not charge the defendant doctor personally with any act of negligence, either of commission or omission, but that the testimony made out a prima facie case of negligence against the interne, and that therefore "the only legal question involved is whether the doctrine of respondeat superior applies, that is to say, whether, for the purpose of and during the course of the operation, which included the immediate caretaking of the infant child, the interne was, in the view of the law, the servant or employee of defendant [doctor]."

The Supreme Court stated that the defendant doctor chose to "borrow from the hospital an interne who thereby became—or so at least a jury might find—his temporary servant or employee for the purpose for which he was engaged," that the defendant doctor himself testified that he had complete control of the operating room and every person within it while the operation was in progress and that tying the cord and inserting the silver nitrate in the infant's eyes were part of the operation. We state the gist of the ruling, applicable to the case at bar, in the words of Mr. Justice Stern, "[The operating surgeon] is in the same complete charge of those who are present and assisting him as is the captain of a ship over all on board * * *." 65 A. 2d 246. The court relieved the plaintiff of judgment of nonsuit and remanded the case for a new trial.

The second case is Yorston v. Pennell, 397 Pa. 28, 153 A. 2d 255 (1959), in which Mr. Justice McBride wrote the majority opinion. The facts were as follows. The plaintiff was injured when a nail ricocheted from a ramset gun he was using, entered his right leg and fractured the fibula. He was taken to the hospital where he became a patient of the defendant doctor. Yorston was allergic to penicillin, a fact which had been discovered by his family doctor a few months prior to the accident. The family doctor had written a note on one of his prescription blanks stating that Yorston was "never" to receive penicillin "under any circumstances." When Yorston got to the hospital he showed the note to one of the nurses and to Dr. Rex, a junior interne. Yorston's wife, who arrived at the hospital shortly after he was admitted, also showed the note to one of the nurses and told another interne that there was a note about an allergy that she had given to the nurse and also that Yorston was allergic to tetanus antitoxin.

Yorston was tested for allergy to tetanus antitoxin and the test proved negative. He was not tested for penicillin allergy. While Yorston was still in the receiving ward another doctor, Dr. Hatemi, was called to the ward.

Dr. Hatemi was a graduate of a medical school in Iran, had spent an internship of a year in a Boston City hospital, and had been appointed a surgical resident at the hospital where Yorston was treated. X-rays were taken and Dr. Hatemi and Dr. Pennell discussed procedures to be followed in respect to Yorston. Yorston was then brought into the operating room, to be operated upon by Dr. Hatemi. At this point Dr. Rex, recalling that though he had been informed that Yorston was allergic to penicillin he had nonetheless neglected to note this fact in Yorston's written history, went to the door of the operating room. Since he was nonsterile and not properly clad for entering the room, Dr. Rex called the nurse anesthetist to the door and asked her to make a notation on Yorston's history that he was allergic to penicillin.

Yorston testified that Dr. Pennell was in the operating room prior to the operation and lifted his leg by the big toe. Dr. Hatemi administered spinal anesthesia. The nail was extracted. As the operation was drawing to a close Dr. Hatemi dictated the post-operative orders and prescribed 600,000 units of penicillin to be administered to Yorston every four hours. Two such administrations were made albeit Yorston informed the nurse on duty that he was allergic to penicillin. Yorston received a third dose despite the fact that apparently he told everyone with whom he came into contact about his penicillin allergy. He testified that on one occasion when Dr. Hatemi and Dr. Pennell were present Dr. Hatemi said he was giving the patient "oremycin" and that Dr. Pennell told him to give Yorston 25,000 units of penicillin. The penicillin treatment finally ceased after a final protest by the patient. Within a short time thereafter Yorston suffered a cerebrovascular accident as a direct result of penicillin reaction.

Mr. Justice McBride said, 153 A. 2d 261, "Neither Dr. Pennell nor Dr. Hatemi would be responsible for the acts of agents of the Hospital, such as nurses who administered

penicillin post-operatively on their own or at the instance of other physicians. Here, the penicillin was administered specifically because of the directions of Dr. Hatemi given while in the operating room and so recorded on the chart. * * *"

Mr. Justice McBride went on to say that Dr. Pennell "was present in contemplation of law since his personally chosen agent performed the operation" and that "[w]hen that personally chosen agent performed the operation the hospital employees assisting in it who ordinarily would not be servants either of Dr. Hatemi or Dr. Pennell became, during that operation at least, the agents of Dr. Pennell through the agency of Dr. Hatemi."

The Supreme Court of Pennsylvania called attention to Benedict v. Bondi, 384 Pa. 574, 122 A. 2d 209 (1956), to Shull v. Schwartz, 364 Pa. 554, 73 A. 2d 402 (1950), and to Scacchi v. Montgomery, 365 Pa. 377, 75 A. 2d 535 (1950).

The third decision on which the plaintiff relies is Rockwell v. Kaplan, 404 Pa. 574, 173 A. 2d 54 (1961). The opinion in this case must be read in conjunction with that of Rockwell v. Stone, 404 Pa. 561, 173 A. 2d 48 (1961), since the latter opinion's statement of facts supplements that of the former. Both these cases involve a single improper administration of sodium pentothal as a preliminary anesthetic to the general anesthesia of Benjamin Rockwell, prior to an elective bursa operation. The drug was so badly administered by a resident physician at the hospital, pursuant to the direction of the chief of the anesthesiology department, Dr. Stone, that the vein was missed and the sodium pentothal was injected either into an artery or its surrounding tissue causing an arterial spasm and subsequent blood clotting, resulting finally in the amputation of Rockwell's arm. Ordinary medical care would have required immediate blocking by procaine, but this technique was not made use of. On the contrary the bursa operation was proceeded with at once.

The sodium pentothal had been administered in the "induction room" which was found to be "under the direction, control and supervision of Dr. Stone." He, then and there, was the "captain of the ship." 173 A. 2d 50. The operating surgeon was Dr. Kaplan and he too was held liable. Dr. Kaplan moved for judgment n.o.v. and in the alternative for a new trial on the ground there was no proof of his negligence. Two dissenting Justices pointed out that insofar as Dr. Kaplan, the operating surgeon, was concerned, there was no evidence of any negligence on his part and that his "liability, if any, must be premised on the theory of vicarious liability." The dissenting Justices posed the following inquiry: "[I]s Dr. Kaplan liable for malpractice under the doctrine of respondeat superior for an act of negligence which occurred, outside his presence and without his knowledge, during the preoperative procedure involved in the administration of an anesthesia?" 173 A. 2d 57.

Mr. Justice Bok, speaking for the majority, said: "Dr. Kaplan's liability rests on two piers, either one of which will support it: his own negligence and his responsibility as principal for Dr. Stone's negligence, which has been established by the companion case of Rockwell v. Stone, supra." 173 A. 2d 55. As to the second pier, Mr. Justice Bok, after referring to Mr. Chief Justice Stern's "famous analogy of the ship captain," went on to quote from McConnell v. Williams, supra, as follows: "But for the period of the operation itself the situation is entirely different, and if operating surgeons were not to be held liable for the negligent performance of the duties of those then working under them, the law would fail in large measure to afford a means of redress for preventable injuries sustained during the course of such operations." 173 A. 2d 56. He then said: "It is clear, under Yorston v. Pennell, 1959, 397 Pa. 28, 153 A. 2d 255, that doctors are subject to the law of agency and may at the same time be

agent both of another physician and of a hospital, even though the employment is not joint.

"This establishes the theory of respondeat superior and also answers the heart of defendant's motion for a new trial." 173 A. 2d 57. The judgment against Dr. Kaplan was affirmed.

As we have stated, the jury found in answer to the third interrogatory that the negligence of an employee of the Albert Einstein Institute was a contributory cause of the death of Professor Abrams. The correctness of this finding may not be questioned for there was uncontrovertible evidence that Professor Abrams' death resulted, at least in part, from the transfusion of incompatible blood during the course of the operation. Some of that blood was in a bottle in the operating room though the record is not clear as to how it got there. The jury finding on this point cannot be disturbed. Cf. Lind. v. Schenley Industries, Inc., 278 F. 2d 79 (3 Cir.), cert. denied, 364 U. S. 835, 81 S. Ct. 58, 5 L. Ed. 2d 60 (1960). There was evidence, already alluded to in this opinion, that Dr. Chodoff, suspecting from the designation on the bottle that it might not contain blood of the type required by Professor Abrams, called Kohn, the technician in charge of the hospital's blood bank and questioned him. Putting his head at or through the open operating room door, Kohn told Dr. Chodoff in the presence of Dr. Lipschutz that the blood was of the correct type for the patient. The transfusion was an essential, an integral, part of the operating procedure. It took place in the operating room where Dr. Lipschutz was the captain of the ship. The statement made by Kohn caused the transfusion to be proceeded with.

We can perceive no valid distinction between the principle applicable to the case of Dr. Lipschutz and that derived from Yorston v. Pennell and Rockwell v. Kaplan, supra. In Yorston, it will be recalled that not only did the hospital staff receive repeated notice of Yorston's allergy but also during the operation, Dr. Rex to whom the

original notice had been given came to the door of the operating room and asked the anesthetist to make a note on Yorston's chart as to the allergy. But this was not done. The Supreme Court of Pennsylvania stated in this connection: "If the nurse failed to correct the history or inform Dr. Hatemi [the operating surgeon] her negligence is apparent." 153 A. 2d 260. Note the factual similarity of the case at bar where Dr. Chodoff called Kohn to the operating room and was assured by him that the bottle contained blood of the correct type for Professor Abrams' transfusion. Observe also that in Rockwell v. Kaplan, the operating surgeon, Dr. Kaplan, as captain of the ship, was seemingly held accountable not only for the individual negligence of the anesthesiologist, Dr. Stone over whom he did not have any realistic measure of control but also, similarly, for the preoperative error of a hospital interne effected outside of the immediate confines of the operating room.

In view of the foregoing it follows that the jury under proper instructions would have been entitled to find Dr. Lipschutz, as the captain of the ship, vicariously liable for the administration of incompatible blood to Professor Abrams. It is not necessary to go outside the operating room because Kohn's statement to Dr. Chodoff, respecting the correct typing of the blood, was made, if we take the evidence most favorable to the plaintiff, with Kohn's head inside the operating room and only a few feet away from the operating surgeon, Dr. Lipschutz. But even if we take the position must unfavorable to the plaintiff, Kohn was in the scrub room but little more than five feet away from Dr. Lipschutz. See Rockwell v. Stone and Rockwell v. Kaplan, supra. The evidence demonstrates that Kohn may have been aware that there were two Israel Abrams in the hospital. The jury could have found that he possessed this knowledge and if they did so, under proper instructions, they could also have found specifically that Kohn's reply to Dr. Chodoff's inquiry constituted negligence. There can

be no doubt that incompatible blood arrived in the operating room because of negligence. Did Kohn become the agent of Dr. Lipschutz at the time he was summoned to the room and replied in answer to Dr. Chodoff's inquiry that the blood was suitable and therefore render Dr. Lipschutz liable for any negligence on the part of Kohn under the captain of the ship doctrine? The jury made no specific finding of the application of the doctrine of respondeat superior either as to Dr. Lipschutz or Dr. Chodoff in respect to the actions of Kohn and the hospital's blood-bank group. The next question is, was there any charge to such effect? Again the answer is in the negative. We come then to the next question. Was there any sufficient request for a charge by the plaintiff which would have covered this vital issue?

Prior to the charge, the plaintiff submitted an additional point for charge, viz., plaintiff's request "No. 10." This was as follows: "I charge that if the incompatible blood administered to Israel Abrams resulted from any negligent act or acts committed by an employee or employees of the Albert Einstein Medical Center, Southern Division, that Dr. Lipschutz and therefore his Estate would be responsible by reason thereof." The court denied this request.

At the close of the charge plaintiff objected to the failure of the court to give the instruction quoted above, as follows: "I would like to have an exception, for the record * * * to that portion of Your Honor's charge that Dr. Lipschutz was not responsible for any other employees than those in the operating room." The court replied: "In line with that point for charge, yes, you may have an exception."

Neither the request embodied in the request for charge No. 10 nor the exception to the charge by the plaintiff would have served to put before the jury fairly and adequately the issue of whether or not Kohn was the agent of Dr. Lipschutz according to the test in Rockwell v. Kaplan supra, or whether Kohn was negligent. The plaintiff made no request in any way relating to the vicarious liability of Dr.

Lipschutz save request No. 10, and even in this request he did not attempt to spell out or to have the court charge in any clear or precise way the application of the captain of the ship doctrine to Dr. Lipschutz for the actions of Kohn. When we say this we do not mean to suggest that it was necessary for the plaintiff to request the court to give the jury a lesson in Latin, but it was the duty of the plaintiff, if he desired a charge based on the vicarious liability of Dr. Lipschutz, to request it in the terms required by Rule 51 and when it was not given by the court upon request and as requested, to make clear and unambiguous objections to the court's action or lack of it so that the trial judge could correct his error or errors. Moreover, the plaintiff did not request the submission to the jury of any interrogatory respecting Kohn's statement at the operating room door in relation to Dr. Lipschutz. See Rule 49. The plaintiff made no objection to the interrogatories as submitted. One may surmise, perhaps, why such requests were not submitted by the plaintiff and why no objections were made to the interrogatories as submitted to the jury. It is possible that the plaintiff was relying on what he presumed to be the "individual" negligence of Dr. Lipschutz. But whatever may be the reason, the plaintiff's request for charge on the basis of the imposition of vicarious liability and his post charge objection were insufficient.

The trial judge apparently took the view that liability could not be imposed on Dr. Lipschutz or Dr. Chodoff under a doctrine of vicarious liability resting on the negligence of "the other hospital employees." This phrase is cryptic. So that it may appear against its proper background, we quote this portion of the charge more fully. It was as follows: "As to Dr. Lipschutz there are two bases of negligence. * * * One of them is called * * * 'vicarious liability.' That means simply that one may be liable for * * * the negligent acts * * * of another * * *." The court went on to charge that the term vicarious liability "simply means that one individual is liable for the negligent acts

of another individual even though the first one did not actually commit the negligent acts." The trial judge said: "Under the law of Pennsylvania * * * a surgeon in an operating room is the principal. He is in command. He is * * * responsible for the negligence of those of the personnel in the operating room who are under him, among whom would be the anesthesiologist; so that if you find that Dr. Chodoff was negligent there would automatically be a similar finding against Dr. Lipschutz." The trial court also said: "I should charge you that neither Dr. Lipschutz nor Dr. Chodoff is vicariously liable in the way I have defined that term *for any of the acts of the other employees of the hospital, including the employees in the blood bank, Mr. Kohn, and whoever else may or may not have been negligent.* The negligence of Dr. Chodoff in this case stems from his individual negligence, if you find that there was such, if you find that he should under the circumstances of this case have taken additional precautions and failed to do so. It is only his individual negligence that I am talking about in respect to Dr. Chodoff. And in respect to Dr. Lipschutz, in the question that I am submitting to you it is only his, Dr. Lipschutz's, individual negligence, not his responsibility as derived from Dr. Chodoff's negligence, if you find such to be the fact. But neither one of them is responsible *for any negligence,* if there was such, *on the part of any other employees of the hospital.*"[4] (Emphasis added.)

This part of the charge was erroneous as to Dr. Lipschutz for the reasons that we have stated and also was unclear. But there was no objection on the part of the plaintiff's counsel to it on any ground except as indicated. As we have stated the provisions of Rule 51 were not complied with by plaintiff's counsel. It is clear that no verdict could or can be molded in favor of the plaintiff in view of the charge.

The plaintiff insists that there was fundamental error because the third interrogatory should not have been pro-

4. T. pp. 820-823.

pounded in conjunction with the two first interrogatories, that the jury should have been instructed to answer the damage interrogatories only if their answer to the first or second interrogatories was yes or their answers to the two first interrogatories were yes and that the instuction as to the interrogatories was fundamentally erroneous because the jury could have thought an affirmative answer to the third interrogatory could have supported an award for damages despite the negative answers to the first two interrogatories. The point is very far from being a potent one for what the plaintiff's counsel belatedly urges in this respect is purely speculative, but the very plain error of the wrong charge referred to in the paragraph immediately preceding this remains to be disposed of.

There was plain or fundamental error in the charge and it was highly prejudicial. As was said in McNamara v. Dionne, 298 F. 2d 352, 355 (2 Cir. 1962): "An appellate court may, in its discretion, disregard Rule 51 when the error claimed is plain and may result in a miscarriage of justice * * *." This power should be exercised sparingly and we are aware of this precept. Cf. Johnson v. United States, 318 U. S. 189, 200, 63 S. Ct. 549, 87 L. Ed. 495 (1943). We think there was a miscarriage of justice in Dr. Lipschutz's case. The ruling of the court below involves the safety of the public and is of great consequence to anyone who must submit to surgery in the Commonwealth of Pennsylvania. The error involved is plain. Under the circumstances, therefore, the plain error doctrine may be applied. See McNello v. John B. Kelly, Inc., 283 F. 2d 96, 102 (3 Cir. 1960). The applicable principle was laid down in this circuit in Callwood v. Callwood, 3 Cir., 233 F. 2d 784, 788 (1956) and in Robinson v. Pennsylvania R. R. Co., 3 Cir., 214 F. 2d 798, 802 (1954). We apply it to Dr. Lipschutz's case. We will order a new trial.

Rule 59(a) provides that a new trial may be granted on all or part of the issues. Here as in Furr v. Herzmark, 92 U. S. App. D. C. 350, 206 F. 2d 468, 472 (1953), though

the issue in the end is the single one of Dr. Lipschutz's negligence, "yet in fact this issue divides into several different issues * * *." One of these issues was designated in interrogatory No. 2 as "individual negligence on the part of Dr. Benjamin Lipschutz which was a contributing cause of the death of Israel Abrams," and the jury answered this interrogatory in the negative. It would not be fair under the circumstances to cause the issue of Dr. Lipschutz's individual negligence, in the sense that we believe the phrase "individual negligence" was used in the interrogatory, to be retried or to grant a new trial to the plaintiff on any ground other than Dr. Lipschutz's vicarious liability in relation to Kohn as delineated above.

As to the appeal in the suit against Dr. Chodoff, we conclude there was no plain or fundamental error in the charge. Dr. Chodoff was not the captain of the ship. Dr. Lipschutz was. To say that Dr. Chodoff was the anesthesiologist and as such was in charge of the transfusion and was therefore responsible for Kohn's seeming negligence would, in our opinion, extend the ship's captain doctrine too far beyond the present bounds of the law of Pennsylvania. Certainly it would grossly distort that law to say that it is plain error to fail to charge a jury that there can be two captains of the ship at one and the same time. The Supreme Court of Pennsylvania has never held that there can be two captains of the ship simultaneously. Moreover, what implication can be gathered from the only decision which we can find which is at all relevant to this issue, Rockwell v. Stone, supra, points in the opposite direction.

The Rockwell cases, supra, it will be remembered, were suits against the operating surgeon, Dr. Kaplan, and the anesthesiologist, Dr. Stone. Dr. Stone was held vicariously accountable for a negligent act of anesthesiology which had taken place immediately preceding the operation and in the induction room adjacent to the operating room. At that time and place an injection of sodium pentothal had

been given by Dr. Jiminez, a resident physician and hospital employee in the anesthesiology department of the hospital. Mr. Justice Jones, speaking for the Supreme Court of Pennsylvania, stated, 173 A. 2d at p. 50: "This accident or mishap took place in the induction room of the hospital in which room all the procedures and all the personnel were under Dr. Stone's direction and control. While the personnel who prepared Rockwell for surgery were hospital employees, they then acted under the direct supervision and control of Dr. Stone: Dr. Jiminez was a resident taking graduate work in anesthesiology and Molnar was a registered nurse taking advanced work in anesthesiology. The record indicates that the Department of Anesthesiology was alerted to Rockwell's impending surgery and that Department, under the aegis of Dr. Stone, set up sodium pentothal as the inducing anesthesia to be followed by a general anesthesia of cyclopropane gas, ether and oxygen. All that took place in the induction room was under the direction, control and supervision of Dr. Stone: *at that time and place he was 'captain of the ship'.*" (Emphasis added.)

We conclude also that the plain error doctrine may not be invoked to support the vicarious responsibility of Dr. Chodoff for the negligence of Kohn or of the employees of the hospital blood bank under Pennsylvania legal standards of respondeat superior generally, as distinguished from that imposed by the captain of the ship doctrine, for the doctrine of respondeat superior presupposes a master and servant relationship under which the master has the right of control over the manner of performance by the servant. No evidence was presented in the proceedings below that Dr. Chodoff had any such control over Kohn or the hospital's blood bank. The blood bank employees were not shown to be other than independent contractors in the traditional sense as regards their relationship to Dr. Chodoff, and it is the Pennsylvania as well as the universal view that such a relationship does not serve as a basis

for vicarious responsibility. See Mature v. Angelo, 373 Pa. 593, 97 A. 2d 59 (1953), and the cases cited therein. This point is conceded.[5]

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5. That the administrator of Israel Abrams was not attempting to hold Dr. Chodoff liable at the trial on any doctrine of vicarious, liability, whether it was of the captain-of-the-ship or of the respondeat superior category, was made plain by a colloquy between the court and counsel at t. pp. 660-661, prior to the argument of counsel to the jury:

"The Court: Well, plaintiff has stated that there is no liability on the part of Dr. Chodoff for any negligence of the employees of the blood bank.

"Mr. Shields (counsel for Dr. Chodoff): He has conceded that to us privately.

"The Court: No, he conceded that at the argument on the motion.

"Mr. Shields: Yes, but that was not before the jury.

"The Court: Well, I would so charge the jury.

"Mr. Shields: If you so charge the jury and limit Mr. Levin in his argument—I think both things are necessary.

"Mr. Levin (counsel for the plaintiff): Your Honor, so far as argument is concerned, I think there is a point here in the case that Dr. Chodoff from his own testimony had the right at the time that he was checking this bottle of blood to direct Mr. Kohn to recheck a sample of blood. I think that of itself is an element of evidence in the case that goes to Dr. Chodoff's responsibility.

"The Court: Yes, but that is not vicarious responsibility for anything that Kohn or anybody in the blood bank might have done.

"Mr. Levin: No, it is not.

"The Court: It is a part of the picture of Dr. Chodoff's negligence, if any there is.

"Mr. Levin: That is right. You recall at the argument on motions Mr. Shields made the point that after all Dr. Chodoff did not make the rules, and could not tell the blood bank what to do, and could not hold up Dr. Lipschutz's operation and all that. This goes to the question of his power to re-check this blood.

"The Court: All right.

"Mr. Levin: And I would not want to be limited in any respect on that points [*sic*].

"Mr. Martin (Counsel for Dr. Lipschutz's executrix): You are going to charge the jury in accordance with the stipulation

The charge as to Dr. Chodoff was inconsistent with the inquiry of the first interrogatory, quoted above, for that interrogatory was not limited to Dr. Chodoff's "individual" negligence as was the second interrogatory limited to Dr. Lipschutz's "individual" negligence. The charge was a limitation on the scope of the first interrogatory, but we think that the limitation was a proper one in view of the fact that Dr. Chodoff was not the captain of the ship.

At the close of his argument to the jury counsel for Dr. Chodoff made a statement to which the plaintiff now vigorously objects, though his counsel took no exception to it at the time. The substance of it was that a verdict against Dr. Chodoff would be "a millstone for the rest of his life"

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5. (continued)

made by plaintiff's attorney regarding vicarious responsibility on the part of both doctors?

"The Court: Oh, sure."

In a letter written by counsel for the plaintiff, Professor Abrams' administrator, to the presiding judge of this court on June 17, 1963, the following appears:

> "With respect to Dr. Chodoff, plaintiff did not press at the trial or submit a point for charge on the issue of his responsibility as a sub-principal. The Pennsylvania cases were clear on the scope of the surgeon's duty, but there was no specific ruling on the vicarious liability of an anesthesiologist, and in view of the strong evidence of the direct negligence of Dr. Chodoff, it did not then seem wise to introduce another contested legal issue into the case. The issue was raised in the post-trial motions. *Not having pressed it below, we did not argue the issue on this appeal.* On the merits we think the vicarious liability of the anesthesiologist, as first mate in charge of the blood, is soundly based in Pennsylvania law." (Emphasis added.)

It must be borne in mind, as is candidly admitted by the plaintiff's counsel in his letter, that the plaintiff did not see fit to argue the issue of Dr. Chodoff's vicarious liability on this appeal. And the plaintiff seems to have decided as a matter of tactics not to bring that issue forward at the trial but to rely rather on "the strong evidence of the direct negligence of Dr. Chodoff." Without regard for the provisions of our rule 24(2)(b) and our decision in United States v. Certain Land in the City of Paterson, 3 Cir., 322 F. 2d 866 (1963), we are of the opinion that we cannot with propriety or fairness apply the plain error doctrine to a point abandoned by a party prior to submission of his case to the jury and not asserted in this court.

as a professional man and that "the fragile thread of the evidence * * * is insufficient to support that millstone * * *." These statements, say the plaintiff, in and of themselves were fundamentally prejudicial, and we should sua sponte reverse because of them even in the absence of an objection. We cannot agree. The statements should not have been made. The trial court should have ordered the jury to disregard them and should have cautioned counsel against repetition of the error. But we cannot deem what was said to be of such importance as to rise to the dignity of plain error.

Dr. Lipschutz's executrix asserts that a release executed by the plaintiff in favor of the hospital, its agents and employees, but expressly reserving rights against Dr. Lipschutz, bars the plaintiff from recovering a judgment against the doctor. Appellee's argument is pitched on the ground that the situation presented is not one of joint tortfeasors but one of primary and secondary liability. Therefore, she asserts, if the one primarily liable be discharged, the release operates to discharge anyone secondarily responsible, citing the Restatement, Security, Section 122. But the executrix has mistaken the positions of the hospital and of Dr. Lipschutz. They were joint tortfeasors, both vicariously liable. In any event, Section 122 of the Restatement provides that the surety is not discharged if as here, "the creditor in the release reserves his right against the surety." The law of Pennsylvania on the subject of joint tortfeasors is clearly applicable to this issue and decides it in favor of the plaintiff. See 12 P. S. Sections 2082-2089.

All other points raised by the parties do not require discussion.

The judgment in favor of Dr. Chodoff at our No. 14,239 will be affirmed. The judgment in favor of Dr. Lipschutz's executrix at our No. 14,238, will be reversed to the extent indicated and the case against Dr. Lipschutz's executrix will be remanded for a new trial on the restricted issue hereinbefore delineated.

McLaughlin, *Circuit Judge* (concurring in part and dissenting in part).

I concur in the fine opinion of the Majority that the question of Dr. Lipschutz's vicarious liability should have been submitted to the jury. I dissent from the view that Dr. Chodoff cannot be vicariously accountable.

In the factual situation presented, before attempting to identify servants and agents, it is necessary to isolate principals, those who are susceptible to vicarious accountability. The hospital, though not in this suit, could be held a principal, this apart from the issue whether the hospital could be looked to for damages.[1] See Brown v. Moore, 247 F. 2d 711, 69 A. L. R. 2d 288 (3 Cir. 1957); Rockwell v. Stone, 404 Pa. 561, 173 A. 2d 48 (1961). So, too, can the doctor who contracted to perform an operation, expressly or impliedly. McConnell v. Williams, 361 Pa. 355, 65 A. 2d 243 (1949); Benedict v. Bondi, 384 Pa. 574, 122 A. 2d 209 (1956); Yorston v. Pennell, 397 Pa. 28, 153 A. 2d 255 (1959); Rockwell v. Kaplan, 404 Pa. 574, 173 A. 2d 54 (1961).

Also, under Rockwell v. Stone, 404 Pa. 561, 173 A. 2d 48 (1961), one responsible "for a step in the operative procedure, the anesthesia step," [See Rockwell v. Kaplan, 404 Pa. 574, 579, 173 A. 2d 54 (1961)] can be a principal. In fact, the circumstances here are quite similar factually to those in Rockwell v. Stone, 404 Pa. 561, 173 A. 2d 48 (1961) and Rockwell v. Kaplan, 404 Pa. 574, 173 A. 2d 54 (1961) at least insofar as the relationship between the doctors in concerned. In those instances, both doctors on separate appeals, by virtue of their respective responsibilities regarding the same operation, were held to be principals and subject to vicarious liability. In this appeal, Dr. Chodoff, like Dr. Stone, was in charge of the anesthesia and the blood transfusion. Like Dr. Kaplan, Wr. Lipschutz was respon-

1. See Michael v. Hahnemann Medical College and Hospital, 404 Pa. 424, 172 A. 2d 769 (1961) which reaffirmed the rule in Pennsylvania that charities and other eleemosynary institutions are immune from liability for the torts of their agents, servants, workmen and employees.

sible for the whole operation. Dr. Chodoff was his "agent for a step in the operative procedure, the anesthesia step." Rockwell v. Kaplan, 404 Pa. 574, 579, 173 A. 2d 54 (1961).

On the question of whether Kohn and his department became the agent of Dr. Chodoff, the Majority feels that Kohn could not, because Dr. Chodoff did not have the "right of control over the manner of performance." This has been the traditional test in Pennsylvania where there was an agency situation involving a borrowed servant or an independent contractor.[2] Mature v. Angelo, 373 Pa. 593, 97 A. 2d 59 (1953) and the cases cited within. See Mantonti v. Research Cottrell, Inc., 202 F. Supp. 527 (E. D. Pa. 1962). But the four Pennsylvania decisions dealing with the doctrine of Respondeat Superior in medical malpractice disputes, arising out of an operation, have not required that there be "control over the manner of performance," in order to find an agency relationship. McConnell v. Williams, 361 Pa. 355, 65 A. 2d 243 (1949); Benedict v. Bondi, 384 Pa. 574, 122 A. 2d 209 (1956); Yorston v. Pennell, 397 Pa. 28, 153 A. 2d 255 (1959); Rockwell v. Stone, 404 Pa. 561, 173 A. 2d 48 (1961); Rockwell v. Kaplan, 404 Pa. 574, 173 A. 2d 54 (1961). Rather these decisions represent an attempt by the Pennsylvania Supreme Court to carve out a test of the control that will be required to make an employee of the hospital a servant of a doctor involved in an operation. In McConnell, the court formulated a fiction, the so-called "captain of the ship doctrine",[3] to do away with

2. In effect the problem as it appears to the Majority is: Did the hospital loan its equipment and employees to the doctors establishing a relation of master and servant, or did the hospital and its laboratory undertake to perform a specific job and be responsible to the doctors only for a result, i.e., the preparing of blood for the operation. See Mantonti v. Research Cottrell, Inc., 202 F. Supp. 527 (E. D. Pa. 1962).

3. This doctrine asserts that as a matter of law, in the course of an operation, in the operating room of a hospital, and until the surgeon leaves the room at the conclusion of the operation, he is in the same complete charge of those who are present and assisting him as is the captain of a ship over all on board. McConnell, supra, 361 Pa. p. 362, 65 A. 2d p. 246.

the traditional test of control and widen a doctor's vicarious liability. The court set apart the period of an operation as one of special consideration with a special rule governing it, "in view of the high degree of protection to which an anesthetized, unconscious patient is entitled." McConnell, supra, 361 Pa. p. 362, 65 A. 2d p. 246. Said the court:

> "But for the period of the operation itself the situation is entirely different, and if operating surgeons were not to be held liable for the negligent performance of the duties of those then working under them, the law would fail in large measure to afford a means of redress for preventable injuries sustained during the course of such operations." McConnell, 361 Pa. p. 364, 65 A. 2d p. 247; Rockwell, 404 Pa. p. 579, 173 A. 2d p. 56.

The restrictive connotation of captain of the ship accountability has not been strictly followed.[4] While the court in those decisions reiterated the test of "right of control over the manner of performance", its application was troublesome, for the question still facing the court was what extent of "control over the manner of performance" it would require. In Yorston, there was no mention per se of the captain of the ship test. The court there spoke of respondeat superior principles. There was no factual determination regarding whether there was control over the manner of performance as to Dr. Rex who was directed and ordered to take a case history and did it negligently. In Rockwell,

4. In Benedict, the negligent act causing the injury probably occurred outside the operating room, i.e., the faulty preparation of the hot water bottles. The court was forced to bring somehow into the operating room the negligent act. In Yorston, the operating surgeon in fact was not in control, but subject to Pennell, the defendant doctor; the initial negligent act occurred outside the operating room, before the operation began, i.e., the making of the case history; further, the operation itself was a success. In Rockwell v. Stone, Stone was deemed captain of the ship, even though he was not present when the badly administered injection (not an operation) took place which injection was made outside the four walls of the operating room.

the sole indication of control over the manner of performance of Dr. Stone was that Dr. Kaplan had the authority to stop the administration of the anesthesia. Although the captain of the ship doctrine was referred to, it was not determinative. The court discussed the control it would require. It noted that Dr. Stone acted on Dr. Kaplan's business; that operating surgeons should be "held liable for the negligent performance of the duties of those then working under them." Rockwell v. Kaplan, 404 Pa. 574, 579, 173 A. 2d 54, 56 (1961).

Where there are specialists connected with a phase of an operation, it is highly unlikely that doctors in charge would have enough familarity with the particular procedure to have effective control over the manner of performance. As Mr. Justice Maxey said in Silveus v. Grossman, 307 Pa. 272, 278, 161 A. 362 (1932) and Rodgers v. Saxton, 305 Pa. 479, 488, 158 A. 166 (1932), quoted in McConnell v. Williams, supra: "Responsibility is commensurate with authority." In this trial there was enough evidence to show that Dr. Chodoff had the authority to and did order the blood from the laboratory, call Kohn to account when he saw error, and presumably order Kohn, to verify which was the proper blood, that Kohn was acting under Dr. Chodoff's orders and on his business. All of that constitutes enough control over Kohn by Chodoff as to make the latter vicariously liable. Said the court in McConnell at 361 Pa. p. 362, 65 A. 2d p. 246:

> "If, then, it be true that defendant had supervisory control and the right to give orders to the interne in regard to the very act in the performance of which the latter was negligent, it would follow, according to the classical test of agency hereinbefore stated, that a jury would be justified in concluding that the temporary relationship between defendant and the interne was that of master and servant * * *."

This has been the theme reiterated and determinative in the later opinions. There is the recurring presence of a man of

authority, giving orders, directing this or that be done regarding the operation.[5] Therefore, as Pennsylvania law now stands, the Supreme Court of that Commonwealth would, I think, hold Dr. Chodoff vicariously liable for Kohn's alleged negligence.

The Majority has stated that the Commonwealth's law does not contemplate two captains of the ship. That may be so, within the framework of that fiction, but the Rockwell cases indicate to me that with respect to the same operation, there can be two principals, whether or not one labels one doctor captain of the S. S. Anesthesia and the other captain of the S. S. Operation, or characterizes the relation in captain-first-mate terms.

Since the captain of the ship rule has not been categorically repudiated, the Majority is justified in holding that Kohn, because he entered upon the operating room, brought himself within the doctrine, and became the agent of Dr. Lipschutz.

But I believe that Pennsylvania would countenance another basis of liability for Dr. Lipschutz, that of vicarious liability for his agent Dr. Chodoff, whose subagent Kohn was negligent, all in the scope of their respective employments. See Rockwell cases, supra.

As I see it, there is enough here to permit the question of whether Kohn became the agent of either doctor or both of them, to go to the jury under proper instructions. Benedict v. Bondi, 384 Pa. 574, 122 A. 2d 209 (1956); Yorston v. Pennell, 397 Pa. 28, 32, 153 A. 2d 255, 85 A. L. R. 2d 872 (1959); Rockwell v. Stone, 404 Pa. 561, 173 A. 2d 48 (1961). See also Mature v. Angelo, 373 Pa. 593, 598, 97 A. 2d 59 (1953); Siidekum, Administrator v. Animal Rescue League of Pittsburgh, 353 Pa. 408, 45 A. 2d 59 (1946).

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5. McConnell, 361 Pa. pp. 362-363, 65 A. 2d pp. 246, 247; Benedict, 384 Pa. pp. 577, 579, 122 A. 2d pp. 210, 211; Yorston, 397 Pa. p. 40, 153 A. 2d p. 260; Rockwell v. Stone, 404 Pa. p. 568, 173 A. 2d p. 51; Rockwell v. Kaplan, 404 Pa. p. 578, 173 A. 2d p. 56.

The Majority feels that, in light of plaintiff's concessions, Rule 51 F. R. Civ. P. is properly applied, there being no plain error. It seems to me that if there is sufficient evidence to support a proper charge, and that charge was on a fundamental point, error by counsel in the applicable law does not relieve the trial judge of charging the law of the case. If it was fundamental I believe we ought to recognize it on appeal. Counsel can stipulate fact, but ordinarily cannot stipulate or concede law. It is not necessary that the error be plain or obvious, to be cognizable. District Courts make few "obvious" errors, they are invariably arguable. This was arguable but none the less fundamental. It went to the liability itself of a defendant under applicable law. See Callwood v. Callwood, 233 F. 2d 784, 788 (3 Cir. 1956); McNello v. John B. Kelly, Inc., 283 F. 2d 96 (3 Cir. 1960).

ON PETITION FOR REHEARING.

Before BIGGS, *Chief Judge,* and MCLAUGHLIN, KALODNER, STALEY, GANEY and SMITH, *Circuit Judges.*

PER CURIAM.

In our original opinion we held that the release did not absolve Dr. Lipschutz of vicarious liability to the plaintiff Mazer and accordingly reversed the judgment and ordered the case remanded for trial on the issue of Dr. Lipschutz's vicarious liability. Dr. Lipschutz's executrix insists that we should now rule on other issues respecting the release which might arise and be presented on remand. We deem such consideration by this court at this time to be premature. "The parties may, of course, present their views respecting the effect of the release to the court below which may rule in respect thereto as the facts and the law may require." Accordingly, rehearing will be denied.

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IN THE

Supreme Court of the United States

October Term, 1965.

No. 301

MILTON MAZER, Administrator of the Estate of ISRAEL ABRAMS, dec'd,

Respondent,

v.

HATTIE LIPSHUTZ, Executrix of the Estate of BENJAMIN LIPSHUTZ, dec'd,

Petitioner,

v.

ALBERT KOHN,

Petitioner.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1965.

No.

MILTON MAZER, ADMINISTRATOR OF THE ESTATE OF ISRAEL ABRAMS, DECEASED,

Respondent,

v.

HATTIE LIPSHUTZ, EXECUTRIX OF THE ESTATE OF BENJAMIN LIPSHUTZ, DECEASED,

Petitioner,

v.

ALBERT KOHN,

Petitioner.

BRIEF FOR RESPONDENT IN OPPOSITION.

Argument.

The facts in this case will not be repeated inasmuch as they appear explicitly in the Petition before this Court, Opinions by McLaughlin, J. (2a), 360 Fed. 2nd 275 and Biggs, J. (13a), 327 Fed. 2nd 42. Two panels of Federal Appellate Court Jurists—with only McLaughlin, J. sitting on both—have found, without dissent, no merit in Petitioner's legal position.

No Federal or Constitutional question is involved here. The legal issues are purely local in character and are of no public importance. They relate to the effect under the Pennsylvania Uniform Contribution Among Joint Tort Feasor's Act and under the Common Law of Pennsylvania of the terms of a release given to an alleged tort feasor, its agents and employees. Federal cases in other jurisdictions, cited by the Petitioner, can have no bearing upon the local law of Pennsylvania. In the nature of the case, there can be no conflicts among circuits.

It is submitted the Petition should be dismissed.

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